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March 31, 2009

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Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

224792

RE: Finance Docket No. 35175, *Roseburg Forest Products Co., Timber Products Company, LC, Suburban Propane, LP, Cowley D&L, Inc., Sousa Ag Service, and Yreka Western Railroad Company—Alternative Rail Service—Central Oregon & Pacific Railroad, Inc.*
Ex Parte No. 346 (Sub-No. 25C), *Rail General Exemption Authority - Petition for Partial Revocation of Commodity Exemption—Lumber or Wood Products*

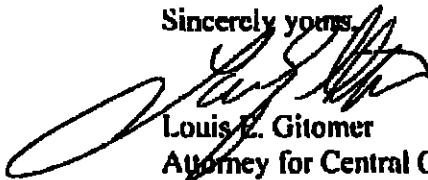
Dear Acting Secretary Quinlan:

224793

Enclosed for e-filing is the Supplemental Statement of the Central Oregon & Pacific Railroad, Inc. in Response to Question of the Surface Transportation Board in the above-entitled proceeding.

I thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer
Attorney for Central Oregon & Pacific
Railroad, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35175

ROSEBURG FOREST PRODUCTS CO., TIMBER PRODUCTS COMPANY, LC,
SUBURBAN PROPANE, LP, COWLEY D&L, INC., SOUSA AG SERVICE, AND YREKA
WESTERN RAILROAD COMPANY- ALTERNATIVE RAIL SERVICE-
CENTRAL OREGON & PACIFIC RAILROAD, INC

Ex Parte No. 346 (Sub-No. 25C)

RAIL GENERAL EXEMPTION AUTHORITY-PETITION FOR PARTIAL REVOCATION
OF COMMODITY EXEMPTION-LUMBER OR WOOD PRODUCTS

SUPPLEMENTAL STATEMENT OF CENTRAL OREGON & PACIFIC RAILROAD, INC.
IN RESPONSE TO QUESTIONS THE SURFACE TRANSPORTATION BOARD RAISED

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Dated. March 31, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35175

ROSEBURG FOREST PRODUCTS CO., TIMBER PRODUCTS COMPANY, LC,
SUBURBAN PROPANE, LP, COWLEY D&L, INC., SOUSA AG SERVICE, AND YREKA
WESTERN RAILROAD COMPANY—ALTERNATIVE RAIL SERVICE—
CENTRAL OREGON & PACIFIC RAILROAD, INC

Ex Parte No. 346 (Sub-No 25C)

RAIL GENERAL EXEMPTION AUTHORITY -PETITION FOR PARTIAL REVOCATION
OF COMMODITY EXEMPTION—LUMBER OR WOOD PRODUCTS

SUPPLEMENTAL STATEMENT OF CENTRAL OREGON & PACIFIC RAILROAD, INC
IN RESPONSE TO QUESTIONS THE SURFACE TRANSPORTATION BOARD RAISED

By decision served March 4, 2009¹, the Surface Transportation Board (the "Board")
ordered the Central Oregon & Pacific Railroad, Inc. ("CORP") to

clarify why it is opposed to alternative rail service given that petitioners have
diverted their traffic to truck transportation and that CORP would be compensated
for WTL's operation of the Line, as CORP insisted in its proposal to voluntarily
lease the Black Butte-Medford portion of the Line to WTL. CORP should also
respond to the contentions that it failed to give notice of the scaled-back rate
increases or make copies of its tariff available from customary sources. Finally,
CORP should clarify the ambiguities noted above regarding petitioner-shippers'
other rail options.

¹ *Roseburg Forest Products Co., Timber Products Company, L.P., Suburban Propane, L.P., Cowley D&L, Inc., Sousa Ag Service, and Yreka Western Railroad Company—Alternative Rail Service—Central Oregon & Pacific Railroad, Inc.*, STB Finance Docket No. 35175; *Rail General Exemption Authority—Petition for Partial Revocation of Commodity Exemption—Lumber or Wood Products*, Ex Parte No. 346 (Sub-No. 25-C) (STB served March 4, 2009), at 11 (the "Interim Decision").

CORP will respond to the Board's three specific questions. However, as CORP previously argued, and as became clear in negotiations, the issue in dispute is not a substantial, measurable deterioration in rail service where provision of temporary service by a third party will allow CORP to provide adequate service in the future. The dispute concerns the rate that CORP is charging and the amount of compensation that would have to be paid for alternate rail service under the Board's criteria.

CORP remains ready, willing, and able to provide railroad service between Black Butte, CA and Dillard, OR pursuant to the rates that became effective on May 28, 2008. CORP cannot provide service if it does not receive a request for service and if it is not tendered traffic. CORP has not received a request for rail service and no shipper has tendered traffic to CORP for transport between Black Butte (including intermediate points) and Dillard.

BACKGROUND

On August 26, 2008, a petition seeking alternative rail service pursuant to 49 U.S.C. §11123(a) and 49 C.F.R. §1146 (the "Petition") was filed by Roseburg Forest Products Co. ("RFP"), Timber Products Company, LC ("TPC"), Suburban Propane, LP ("SP"), Cowley D&L, Inc. ("CDL"), Sousa Ag Service ("SAS"), and Yreka Western Railroad Company ("YWRC"), jointly the "Petitioners." Petitioners sought authority for the West Texas & Lubbock Railway Company, Inc. ("WTL"), through its agent, YWR, to provide alternative rail service over 218 miles of rail line (the "Line") operated by CORP. The Line extends northward from CORP's connection with Union Pacific Railroad Company ("UP") at Black Butte, CA, milepost 346.00, to Dillard, OR, milepost 562.00. UP owns the 79.25-mile portion of the Line between Black Butte and Bellview, OR, milepost 425.29, and CORP owns the remaining 138.75 miles. In the

same pleading, RFP and TPC also filed a request pursuant to 49 U.S.C. §10502(d) and 49 C.F.R. §1121.4(f) to partially revoke the exemption of lumber and wood products so that they can obtain the relief sought in the Petition.

According to Petitioners, WTL will only provide service on the Line to Petitioners. Petitioners contend that CORP will be responsible for serving any other shippers on the Line.

UP filed a response to Petitioners requesting an agreement with WTL to operate over the portion of the line owned by UP.

CORP responded to the Petition on September 3, 2008, arguing that Petitioners had not met the criteria set forth in 49 C.F.R. §1146, and requesting the Board to deny the Petition.² In its response, CORP also recognized the possibility of voluntarily negotiating an agreement with Petitioners to permit operations over the Line or a portion of the Line as long as the Petitioners were willing to pay compensation pursuant to the Board's formula developed in *Pyco Industries, Inc. Alternative Rail Service-South Plains Switching, Ltd Co*, STB Finance Docket No. 34889 (STB served January 11, 2008) at 6, which provides that:

compensation should consist of three components: (1) the variable cost incurred by the owning carrier as a result of the tenant carrier's operations over the owning carrier's tracks, (2) the tenant carrier's proportionate share of the track's maintenance and operation expenses, and (3) an interest or rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track. (the "*Pyco Formula*")

In addition to compensation, CORP sought to have WTL agree to accept liability for any loss or damage to anyone caused by its operations and also provide sufficient insurance to insure that CORP is protected. Because of the difficult terrain involved in the operations between

² CORP filed a letter on September 4, 2008 pointing out the actual rates that had been in effect for traffic moving over the Line since May 28, 2008

Black Butte and Medford, CORP sought to have WTL ensure that its engineers are qualified to operate on the territory and that WTL has appropriate locomotives to perform the service (CORP expects compensation for any costs it occurs in qualifying WTL engineers or other personnel) Finally, CORP believed that the agreement should contain standard industry terms for other matters, including advance payment of rental from WTL to CORP.

Because Petitioners had initiated this proceeding under the Board's expedited procedures, CORP proposed an expedited 15-day negotiation schedule. In its September 3rd response, CORP suggested that the parties negotiate until September 18th, at which time they would report to the Board on the progress made and be prepared to come to the Board on September 19th for mediation.

WTL filed rebuttal on September 8, 2008 Petitioners filed rebuttal on September 9, 2008 and agreed to negotiate with CORP, but on a 30-day schedule. By decision served September 19, 2008, the Board held these proceedings in abeyance and ordered the parties to negotiate and report to the Board within 30 days.

Prior to meeting, pursuant to a confidentiality agreement, CORP provided Petitioners with the net liquidation value of the Line and the projected capital costs for the Line. The parties met on October 2, 2008, but were unable to come to terms. CORP and the Petitioners individually notified the Board on October 6, 2008 that negotiations had been unsuccessful and requested that the proceeding be returned to active status. The Board served the *Interim Decision* on March 4, 2009.

Based on the record developed by Petitioners under the Board's rules, the Board concluded that

The record does not establish the existence of a rail transportation emergency having a substantial adverse effect on rail shippers. Although petitioners have experienced a reduction in service frequency and have documented some service inadequacy, they have not established that a substantial, measurable service deterioration exists that would justify an alternative service order. Normally, in such a case, we would not address the remaining criteria for authorizing alternative rail service. But because we are affording the parties an opportunity to submit supplemental evidence on this issue, we proceed to address the other criteria.³

As a result of the above conclusion, where the Board fails to explain why it is not acting in these proceedings as it normally does, the Board sought additional information from Petitioners, WTL, and CORP. CORP will now address the specific questions that the Board has asked of CORP.

RESPONSE TO THE SPECIFIC QUESTIONS TO CORP

1. CORP should clarify why it is opposed to alternative rail service given that petitioners have diverted their traffic to truck transportation and that CORP would be compensated for WTL's operation of the Line, as CORP insisted in its proposal to voluntarily lease the Black Butte-Medford portion of the Line to WTL.

CORP opposes the imposition of alternative rail service on the Line because CORP has consistently held itself out to provide common carrier service upon reasonable demand at reasonable rates. CORP is not responsible for the Petitioners decision to divert traffic from the railroad to alternate modes of transportation. As the Board itself concluded, Petitioners have not established "the existence of a rail transportation emergency having a substantial adverse effect on rail shippers."⁴ The Petitioners have not met the criteria for the Board to impose alternative rail service. They have not demonstrated that CORP is providing inadequate service, merely that they are not willing to pay the rates that became effective on May 28, 2008. CORP remains ready, willing, and able to provide railroad service between Black Butte, CA and Dillard, OR

³ *Interim Decision* at 9

⁴ *Id.*

pursuant to the rates that became effective on May 28, 2008. Service has not been requested and traffic has not been tendered to CORP for transportation between Black Butte (and intermediate points) and Dillard. It is now 10 months after the rate reduction and the shippers have not sought service over CORP between Black Butte (and intermediate points) and Dillard.

CORP will provide reasonable service on demand at reasonable rates. However, because of the costs that CORP incurs in providing the service, including the use of five locomotives and the fuel cost for five locomotives, CORP cannot continue to provide service without at least covering its costs. The rates placed in effect on May 28, 2008 covered CORP's costs. If, as it does here, CORP must choose between continuing to provide service and lose money on each carload because the shippers will not ship unless the current rates are reduced, or lose the traffic to truck and avoid the losses from operating the Line, CORP will accept the diversion of traffic.⁵ CORP's position is consistent with the rail transportation policy which has the policy objectives of "allowing rail carriers to earn adequate revenues" (49 U.S.C. §10101(3)), ensuring "the development and continuation of a sound transportation system" (49 U.S.C. §10101(4)), fostering "sound economic conditions in transportation" (49 U.S.C. §10101(5)); and encouraging "honest and efficient management of railroads" (49 U.S.C. §10101(9)).

CORP is also concerned about being compensated for use of its property as required by the Board's *Pyco Formula*. CORP contends that through voluntary negotiations with Petitioners and WTL it can better assure that it is paid the compensation required by the *Pyco Formula* without further litigation and without relying on the Board to impose and enforce an agreement. Where the Board imposes involuntary alternate service over the Line and compensation, CORP

⁵ Whether CORP provides service under reduced rates or the traffic is diverted to trucks, CORP will not cover the opportunity costs of the Line.

is concerned that it will have to enforce the Board's compensation and incur delay and additional litigation expenses that it will be unable to recover. Indeed, CORP has reason to believe that WTI and Petitioners are not willing to pay compensation as mandated under the Pyco Formula even for the portion of the Line between Bellview and Ashland, which has a net liquidation value in substantially in excess of \$2 million

CORP opposes alternate service because it has done nothing wrong. Petitioners have not demonstrated "a rail transportation emergency having a substantial adverse effect on rail shippers."⁶ CORP has made the economically rational decision of permitting traffic that it would have to lose money on to carry to be diverted to another mode. CORP must be assured that it will receive appropriate compensation for the use of the Line and that the condition of the Line will not deteriorate as a result of alternate service. As explained above, CORP opposes alternate rail service

2. CORP should also respond to the contentions that it failed to give notice of the scaled-back rate increases or make copies of its tariff available from customary sources.

After imposing rate increases on May 6, 2008, CORP then reduced the rates on May 28, 2008. There is no requirement under the law for a railroad to provide advance notice of a rate decrease. The commodities in question are lumber or wood products that are exempt from the provisions of 49 U.S.C. Subtitle IV as set out at 49 C.F.R. §1039.11.

CORP notified TPC on April 11, 2008 that it would extend until May 6, 2008 the Exempt Carload Quotations CORP Q-08-01, CORP Q-08-02, CORP Q-08-03, and CORP Q-08-04 that were scheduled to expire on April 11, 2008. On April 15, 2008, CORP notified RFP that it was terminating Exempt Carload Quotation CORP No. Q-06-15 that had been effective since October

⁶ *Id*

1, 2006 as of May 14, 2008. CORP issued Freight Tariff CORP 8000.01 on April 15, 2008, to be effective on May 6, 2008, increasing rates between Weed, CA and destinations in Oregon for local traffic moving on CORP. Even though the rates applied to exempt wood and lumber movements and it was not bound to do so, CORP complied with the Board's notice requirements by providing 20 days notice of the rate increase as required by 49 C.F.R. §1300.4(a)

After the rate increase became effective, CORP continued to negotiate with RFP in an attempt to reach a new contract with RFP. Negotiations on the contract continued into July 2008, at which point CORP received no further communications from RFP.

When changing non-exempt rates, CORP complies with the requirements of 49 C.F.R. 1300.4. As demonstrated above, CORP has complied with the requirements of section 1300.4 when increasing exempt rates. There are no notice requirements for rate decreases. However, for all rates, CORP maintains copies at its corporate office and makes the rates available on its web site. CORP's tariff information is found at www.railamerica.com/ShippingServices/RailServices/CORP.aspx#tariffs

There was no notice requirement for the May 28, 2008 rate reduction because the commodities are exempt and there is no notice requirement for rate reductions. CORP did make the new rates available at the customary locations. CORP did not provide specific notice of the rate reduction to RFP or TPC because both had rejected similar rates previously during contract negotiations and diverted their traffic to truck.

On September 4, 2008, CORP purposely filed a supplement to its response to clarify to the Board and Petitioners that there had been a rate reduction on May 28, 2008. Even with the personal notice of the rate reductions delivered to Petitioners pursuant to the Board's service

rules, none of the Petitioners have sought to move traffic under the Tariff CORP 8000.02 during the past six months.

3. Finally, CORP should clarify the ambiguities noted above regarding petitioner-shippers' other rail options.

CORP explained that Petitioners have three physical rail options for shipping between Black Butte (and intermediate points south of Bellview) and Medford. Only one option is under the complete control of CORP.

Petitioners could request service from CORP over the Line on the existing two day per week schedule that CORP has established and pursuant to existing rates. CORP remains ready, willing, and able to provide common carrier service over the line upon reasonable request and upon payment of reasonable rates.

CORP is willing to reroute traffic from Montague, Grenada, and Weed south to Black Butte for interchange to the UP which handles the traffic north to Springfield for interchange to CORP which will then transport the traffic south for delivery to Dillard, Riddle, Grants Pass, White City, Medford, and Ashland.

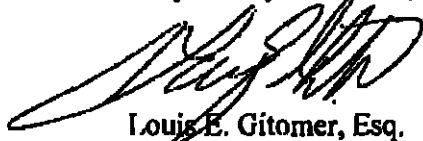
Generally, over the re-route via Black Butte, it will take between five to eight days to move traffic from origins such as Grenada, Montague, Yreka, and Weed, to destinations such as Medford, Grants Pass, White City, Riddle, and Dillard. In addition, the rates for the movement appear to be higher than those that CORP has in effect for the northbound movement of traffic over the Siskiyou Pass. However, the northbound reroute does not have the same constraints on train size as the route over the Siskiyou Pass. Therefore, the volume of traffic could be handled without having to leave cars behind because of lack of motive power.

The third alternative is up to UP, and CORP is not authorized to speak for or make commitments for UP. However, the move would involve UP exercising its rights under the lease to operate between Black Butte and Bellview, and interchanging with CORP at a location agreed upon by the parties at or north of Bellview.

CONCLUSION

CORP has responded to the questions raised by the Board. CORP respectfully requests the Board to deny the emergency service sought by Petitioners because they have failed to demonstrate that over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by CORP.

Respectfully submitted,



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Dated: March 31, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served electronically or

by overnight delivery upon:

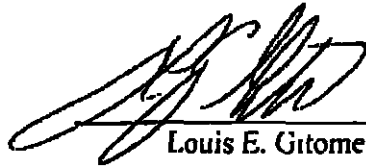
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